IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

XODUS MEDICAL, INC., Plaintiff, v. DUPACO, INC., Defendant.	Civil Action No. ______________________ **JURY TRIAL DEMANDED**

COMPLAINT FOR DECLARATORY JUDGMENT OF INVALIDITY AND NON-INFRINGEMENT

Plaintiff Xodus Medical Inc. (hereafter, "Xodus"), by and through its undersigned counsel, hereby alleges the following for its Complaint against Defendant Dupaco, Inc. (hereafter, "Dupaco"):

NATURE OF THE ACTION

1. This is an action for declaratory judgment of invalidity and non-infringement of a United States patent pursuant to the Declaratory Judgment Act, 28 U.S.C. §§2201-2202, the United States Patent Law, 35 U.S.C. § 1 *et seq.*, the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, and federal and state common law, and for such other relief as the Court deems just and proper. Xodus seeks a declaration that U.S. Patent No. 6,490,737 (hereinafter, "the '737 Patent") is invalid and not infringed by the ProneSafe™ device sold by Xodus. Xodus also seeks a declaration that has not infringed any trademark, trade dress, or copyright

owned by Dupaco, or that any trademark, trade dress or copyright owned by Dupaco relating to its PRONEVIEW is invalid.

PARTIES

2. Xodus is a Pennsylvania corporation having its principal place of business at 702 Prominence Drive, New Kensington, Pennsylvania 15068.

3. Xodus offers for sale the PRONESAFE™ Prone Head Rest (hereafter, "the ProneSafe™ device"), a medical device that is configured to protect the face of a patient during surgical procedures that involve the prone position.

4. Upon information and belief, Dupaco is a Delaware corporation with a principal place of business at 4144 Avenida De La Plata, Oceanside, CA 92056.

5. The '737 Patent, issued on December 10, 2002, and upon information and belief, was assigned to Dupaco on October 1, 2012. *See* Exhibit A.

6. Upon information and belief, Dupaco is the current owner of the '737 Patent.

JURISDICTION AND VENUE

7. This is an action for declaratory judgment under the patent laws of the United States, 35 U.S.C. §§ 1 *et seq.*, the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, federal and state unfair competition law, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1332, 1338, 1367, and 2201-02, based on the existence of an actual controversy between Xodus, on the one hand, and Dupaco,

on the other hand, for claims under the Patent Laws, the Copyright Act, the Lanham Act, and at common law.

8. Dupaco has accused Xodus of infringing claims of the ‘737 Patent for selling the ProneSafe™ device.

9. Dupaco also has accused Xodus of infringing unspecified trademark and trade dress rights and other intellectual property purportedly owned by Dupaco with respect to Xodus’s sale of the ProneSafe™ device.

10. The existence of this controversy is demonstrated by, for example, the letter of October 19, 2016, accusing Xodus’s ProneSafe™ device of being covered by at least claims 2, 24, and 25 of the ‘737 Patent. In addition, after receipt of the letter of October 19, 2016, counsel for Xodus and Dupaco engaged in telephone communications wherein Dupaco asserted that the ProneSafe™ device infringed other, unspecified claims of the ‘737 Patent as well. During telephone communications between counsel, Dupaco also raised unspecified claims of trademark and trade dress infringement. Upon information and belief, Dupaco further is contemplating a claim of copyright infringement and common law unfair competition claims. As recently as April 20, 2017, counsel for Xodus received a voicemail message from counsel for Dupaco, wherein the initiation of a lawsuit was threatened.

11. This Court has personal jurisdiction over Dupaco by reasons of the extensive business conducted in this State, and specifically within this Judicial District. On information and belief, Dupaco is in the business of manufacturing

medical devices, and selling them nation-wide, including within this Judicial District.

12. In addition, this Court has personal jurisdiction over Dupaco because Dupaco has threatened Xodus with a suit alleging patent infringement. Xodus has its principal place of business in New Kensington, Pennsylvania. Thus, Xodus is sustaining damages as a result of Dupaco's actionable conduct within this Judicial District.

13. By purposely targeting residents of this District with its unsupported patent, trademark, and trade dress enforcement activities, Dupaco has an expectation to derive substantial income from their activities in this District.

14. Dupaco's claims for patent infringement, trade mark infringement, trade dress infringement, copyright infringement, and unfair competition made against Xodus are baseless and are purposely intended to harass and inflict harm on Xodus. Dupaco's actions have caused, and will cause, harm in this Judicial District by requiring Xodus, a resident of this Judicial District, to needlessly spend resources to defend against or settle Dupaco's meritless claims. Exercising personal jurisdiction over Dupaco is fair and reasonable because this District has an interest in adjudicating this dispute.

15. Venue is proper in this District in that this Court has personal jurisdiction over Dupaco, and a substantial part of the events giving rise to the claims at issue occurred in this District in that Dupaco has threatened Xodus, a resident of this Judicial District, with a suit alleging patent infringement, trade

mark infringement, trade dress infringement, copyright infringement, and unfair competition. Additionally, venue is proper in this District because a substantial part of the events giving rise to Xodus's claims occurred in this District.

FIRST CLAIM FOR RELIEF – DECLARATION OF INVALIDITY OF THE '737 PATENT

16. Xodus incorporates by reference paragraphs 1 through 15 of this Complaint as if fully set forth herein.

17. The '737 Patent is invalid for failure to meet the conditions of patentability and/or otherwise comply with one or more of 35 U.S.C. §§ 100 *et seq.*, including, but not limited to, Sections 101, 102, 103, and 112.

18. As a result of the acts described in the foregoing paragraphs, a substantial controversy of sufficient immediacy and reality exists to warrant the issuance of a declaratory judgment.

19. A judicial declaration is necessary and appropriate so that Xodus may ascertain its rights with respect to the '737 Patent.

SECOND CLAIM FOR RELIEF – DECLARATION OF NON-INFRINGEMENT OF THE '737 PATENT

20. Xodus incorporates by reference paragraphs 1 through 19 of this Complaint as if fully set forth herein.

21. The accused ProneSafe™ device has not infringed and does not infringe, directly or indirectly, any valid and enforceable claim of the '737 Patent, either literally or under the doctrine of equivalents.

22. As a result of the acts described in the foregoing paragraphs, a substantial controversy of sufficient immediacy and reality exists to warrant the issuance of a declaratory judgment.

23. A judicial declaration is necessary and appropriate so that Xodus may ascertain its rights with respect to the '737 Patent.

THIRD CLAIM FOR RELIEF – DECLARATION OF NON-INFRINGEMENT OF TRADEMARKS

24. Xodus incorporates by reference paragraphs 1 through 23 of this Complaint as if fully set forth herein.

25. There is no likelihood of confusion between Xodus's ProneSafe™ device, or the advertisement and sale thereof, and any valid trademark owned by Dupaco.

26. As a result of the acts described in the foregoing paragraphs, a substantial controversy of sufficient immediacy and reality exists to warrant the issuance of a declaratory judgment.

27. A judicial declaration is necessary and appropriate so that Xodus may ascertain its rights with respect to any trademark threatened by Dupaco.

FOURTH CLAIM FOR RELIEF – DECLARATION OF INVALIDITY OF TRADEMARKS

28. Xodus incorporates by reference paragraphs 1 through 27 of this Complaint as if fully set forth herein.

29. Upon information and belief, Dupaco's threatened and purported trademarks are invalid because, *inter alia*, they do not indicate the source of a

good or service, are generic, are descriptive, and/or lack secondary meaning, have been abandoned, and/or are confusing to the public.

30. As a result of the acts described in the foregoing paragraphs, a substantial controversy of sufficient immediacy and reality exists to warrant the issuance of a declaratory judgment.

31. A judicial declaration is necessary and appropriate so that Xodus may ascertain its rights with respect to Dupaco's threatened trademarks.

FIFTH CLAIM FOR RELIEF – DECLARATION OF NON-INFRINGEMENT OF TRADE DRESS

32. Xodus incorporates by reference paragraphs 1 through 31 of this Complaint as if fully set forth herein.

33. There is no likelihood of confusion between Xodus's ProneSafe™ device and any trade dress owned by Dupaco.

34. Xodus's ProneSafe™ device includes no non-functional elements that are likely to cause confusion with any non-functional element of any product sold by Dupaco.

35. As a result of the acts described in the foregoing paragraphs, a substantial controversy of sufficient immediacy and reality exists to warrant the issuance of a declaratory judgment.

36. A judicial declaration is necessary and appropriate so that Xodus may ascertain its rights with respect to any valid trade dress owned by Dupaco.

SIXTH CLAIM FOR RELIEF – DECLARATION OF INVALIDITY OF TRADE DRESS

37. Xodus incorporates by reference paragraphs 1 through 36 of this Complaint as if fully set forth herein.

38. Upon information and belief, Dupaco's threatened and purported trade dress is invalid because, *inter alia*, it does not indicate the source of a good or service, is generic, is not distinctive, is functional, and/or is confusing to the public.

39. As a result of the acts described in the foregoing paragraphs, a substantial controversy of sufficient immediacy and reality exists to warrant the issuance of a declaratory judgment.

40. A judicial declaration is necessary and appropriate so that Xodus may ascertain its rights with respect to Dupaco's threatened trade dress.

SEVENTH CLAIM FOR RELIEF – DECLARATION OF NON-INFRINGEMENT OF COPYRIGHT

41. Xodus incorporates by reference paragraphs 1 through 40 of this Complaint as if fully set forth herein.

42. Dupaco does not own any valid copyright that is infringed by Xodus's ProneSafe™ device.

43. Upon information and belief, Dupaco has not registered any threatened copyright.

44. As a result of the acts described in the foregoing paragraphs, a substantial controversy of sufficient immediacy and reality exists to warrant the issuance of a declaratory judgment.

45. A judicial declaration is necessary and appropriate so that Xodus may ascertain its rights with respect to any copyright threatened by Dupaco.

EIGHTH CLAIM FOR RELIEF – DECLARATION OF INVALIDITY OF COPYRIGHT

46. Xodus incorporates by reference paragraphs 1 through 45 of this Complaint as if fully set forth herein.

47. Upon information and belief Dupaco's threatened copyrights are invalid because they are not artistic, are merely functional, and/or are otherwise not copyrightable subject matter.

48. As a result of the acts described in the foregoing paragraphs, a substantial controversy of sufficient immediacy and reality exists to warrant the issuance of a declaratory judgment.

49. A judicial declaration is necessary and appropriate so that Xodus may ascertain its rights with respect to any copyright threatened by Dupaco.

NINTH CLAIM FOR RELIEF – DECLARATION OF NO INFRINGEMENT OR UNFAIR COMPETITION UNDER FEDERAL OR STATE LAW

50. Xodus incorporates by reference paragraphs 1 through 49 of this Complaint as if fully set forth herein.

51. There is no likelihood of confusion between Xodus's ProneSafe™ device, or the advertisement and sale thereof, and any product sold by Dupaco.

52. Dupaco's threat of legal action fails to explain any basis to identify any act of unfair competition by Xodus under state or federal law.

53. As a result of the acts described in the foregoing paragraphs, a substantial controversy of sufficient immediacy and reality exists to warrant the issuance of a declaratory judgment.

54. A judicial declaration is necessary and appropriate so that Xodus may ascertain its rights.

PRAYER FOR RELIEF

WHEREFORE Xodus that this Court enter judgment in favor of Xodus, and against Dupaco, as follows:

A. That the '737 Patent is invalid;

B. That the ProneSafe™ device does not infringe any of the claims of the '737 Patent;

C. That this case be declared exceptional pursuant to 35 U.S.C. § 285;

D. That Xodus has not violated any trademark owned by Dupaco;

E. That Dupaco's threatened trademarks are invalid;

F. That Xodus has not violated any trade dress owned by Dupaco;

G. That Dupaco's threatened trade dress is invalid;

H. That Xodus has not violated any copyright owned by Dupaco;

I. That Dupaco's threatened copyrights are invalid;

J. That Xodus has not violated any of Dupaco's intellectual property rights under federal or state common law, and has not engaged in unfair competition;

K. That costs and reasonable attorney's fees be awarded to Xodus; and

L. That Xodus be granted any other and further relief that the Court may deem just and proper.

JURY DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Xodus respectfully requests a trial by jury on all matters raised in the Complaint.

Respectfully submitted,

THE WEBB LAW FIRM

Dated: April 21, 2017

s/ *Thomas C. Wolski*

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